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Supreme Court of the United States

OCTOBER TERM, 1946

No. 1329

TODD SHIPYARD CORPORATION, successor by merger to ROBINS DRY DOCK & REPAIR COMPANY,
Petitioner,
(Respondent-Impleaded-Appellee),

against

GRACE PULEO, as Administratrix of the Estate of PETER PULEO, Deceased,
Respondent,
(Libellant-Appellee),

and

H. E. MOSS & COMPANY, owner of S. S. "LUCELLUM,"
Respondent,
(Respondent-Appellant).

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MACKLIN, BROWN, LENAHAN & SPEER,
Proctors of Petitioner.

PAUL SPEER,
Counsel for Petitioner.

Bowne & Co., Inc., 163 Front Street, New York 7

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Hon. the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Todd Shipyard Corporation, Successor by merger to Robins Dry Dock & Repair Company, respectfully shows to this Court as follows:

This is a petition for a Writ of Certiorari to review a decision in admiralty of the United States Circuit Court of Appeals for the Second Circuit, which decision modified the decree of The United States District Court for the Eastern District of New York holding H. E. Moss & Company solely liable for the death of Peter Puleo, deceased, so as

to hold the petitioner herein primarily liable and H. E. Moss & Company secondarily liable.

The fundamental question presented in this petition is whether the courts should interpret a vessel repair contractor's indemnity agreement as a promise by the contractor to save harmless the owner of the vessel for its own active negligence in the absence of explicit language to that effect.

The petition is prayed for because the decision of the United States Circuit Court of Appeals for the Second Circuit herein is in direct conflict with the decisions upon the same point in other Circuits and the applicable decisions of the Court of Appeals of the State of New York, a local court of last resort, concerning the same important question of local law.

Todd Shipyard Corporation, the petitioner, by contract with the United States Maritime Commission, agreed to make certain repairs to vessels, including the Tanker *Lucellum,* owned by H. E. Moss & Company, and as a part of said contract, agreed to place proper safeguards for the prevention of accidents, to use its best efforts to prevent accidents or injury to the persons or property of another, and to indemnify and save harmless the vessel and the owner of the vessel from all suits or action, and damages or cost of every name and description to which the vessel, or the owner thereof, might be subjected or put by reason of injury to the person or property of another arising or growing out of performance of the contract by the contractor, its servants, agents, or sub-contractors.

Pursuant to the terms of said contract, and while employed by petitioner and engaged in repairing the vessel *Lucellum,* Peter Puleo sustained injuries which were the competent producing cause of his death.

Grace Puleo, as administratrix of the Estate of Peter Puleo, deceased, thereafter instituted action against H. E.

Moss & Company to recover for the wrongful death of the deceased. H. E. Moss & Company thereafter impleaded the petitioner, alleging that the fault was the petitioner's, and in addition thereto pleaded its right to indemnity under the terms of the repair contract.

The Trial Court held that the death of Peter Puleo was due solely to the negligence of H. E. Moss & Company and decreed that the libellant, Grace Puleo, as administratrix, recover of and from H. E. Moss & Company the sum of Thirty-five Thousand fifty-nine and 76/100 ($35,059.76) Dollars, with interest from March 21st, 1946. The Trial Court dismissed the libel and petition against petitioner and adjudged that it recover the sum of Fifty-four and 56/100 ($54.56) Dollars, as costs, together with interest from March 21, 1946.

Upon the appeal of H. E. Moss & Company to the United States Circuit Court of Appeals for the Second Circuit the said Court rendered a decision holding H. E. Moss & Company at fault, and did not hold this petitioner at fault. The Court held however that petitioner was liable to indemnify H. E. Moss & Company, according to the terms of the above described indemnity agreement.

TODD SHIPYARD CORPORATION

By Paul Speer

Counsel

I HEREBY CERTIFY that I have examined the foregoing petition, and that in my opinion it is well founded and entitled to the favorable consideration of this Court, and that it is not filed for the purpose of delay.

Paul Speer

Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1946.

TODD SHIPYARD CORPORATION, successor by merger to ROBINS DRY DOCK & REPAIR COMPANY,
Petitioner,
(Respondent-Impleaded-Appellee),

against

GRACE PULEO, as Administratrix of the Estate of PETER PULEO, Deceased,
Respondent,
(Libellant-Appellee),

and

H. E. MOSS & COMPANY, owner of S. S. "LUCELLUM,"
Respondent,
(Respondent-Appellant).

No. .....

BRIEF IN SUPPORT OF PETITION

The Facts.

Todd Shipyard Corporation, the petitioner, pursuant to contract with the United States Maritime Commission (Moss Exhibit 6, fols. 112-168), made certain repairs to the S/S *Lucellum,* a tanker type ship, owned by the respondent, H. E. Moss & Company.

The said contract, among other things, provided that the petitioner shall indemnify and save harmless the vessel and the owner of the vessel from all suits or action, and damages or cost of every name and description to which the vessel or the owner thereof may be subjected or put by reason of injury to the person or property of another, arising or growing out of the performance of the contract

by the contractor, its servants, agents, or sub-contractors (Article XIV, fols. 144, 145).

Peter Puleo, deceased, an employee of petitioner, while engaged in the performance of said contract, sustained certain injuries which concededly were the competent and producing cause of his death (fol. 230). The said injuries were the result of a gasoline explosion which occurred when the deceased lighted a burning torch for the purposes of freeing a frozen valve on No. 7 tank of said vessel.

The Number 7 tank at the time of the accident was not only an unsafe place in which Puleo was to work with a burner, but was unsafe because of the previous careless performance of a duty resting upon the ship to use reasonable care to properly and efficiently flush away gasoline and its vapors from pipes and valves where work was to be done thereon, such as Puleo was directed to do, with the knowledge of the ship's officers, who were then reasonably aware of the work about to be done and its danger (Findings of Fact No. 6, fol. 742).

A libel was filed by Grace Puleo, as administratrix of the Estate of Peter Puleo, deceased, against respondent, H. E. Moss & Company, who subsequently impleaded petitioner.

The action came on for a hearing before District Court Judge INCH, who held as a fact that H. E. Moss & Company had furnished Peter Puleo, deceased, an unsafe place to work (Findings of Fact No. 6, fol. 742), and concluded that respondent, H. E. Moss & Company, was liable for damages suffered by the Estate of Peter Puleo by reason of his wrongful death, and that petitioner was guilty of no negligence (Conclusions of Law 4 and 6, fols. 752, 753).

An appeal was taken to the Circuit Court of Appeals by the respondent, H. E. Moss & Company, and the Court by its opinion held that petitioner was primarily liable, and the respondent, H. E. Moss & Company, was second-

arily liable, upon the ground "that the Todd Shipyard Company, as successor of the Robins Company, must indemnify the Moss Company under the contract" (Opinion, page 277). The Court did not find negligence upon the part of petitioner.

POINT I.

The decision of the Circuit Court of Appeals is in conflict with the decisions of the highest court of the State of New York.

The indemnity agreement (Contract, Article XIV, fols. 144, 145), by its terms, was limited to suits, actions, damages and costs of every name and description to which "the vessel or owner thereof may be subjected or put by reason of injury to the person or property of another *arising or growing out of performance of the contract by the contractor, its servants, agents or sub-contractors*" (Italics ours).

The Court of Appeals of the State of New York decided that a sub-contractor was not liable to indemnify a contractor for amounts paid in satisfaction of judgments awarded employees of the sub-contractor as the result of injuries sustained by them through the negligence of the contractor.

The sub-contractor's agreement was to indemnify the contractor "against all claims for damages to persons growing out of the execution of the work, and to maintain compensation insurance covering employees as required by law, and liability insurance against all claims for damages for personal injuries or death suffered by persons other than employees and growing out of the execution of the work."

"Work" was defined in the contract as "the work, materials, matters and things required to be done and furnished by sub-contractor under this contract."

In *Thompson-Starrett Company, Inc.* v. *Otis Elevator Company,* 271 N. Y. 36, 41, 43, Mr. Justice HUBBS, speaking for the Court, stated:

> "It is a general rule long established that contracts will not be construed to indemnify a person against his own negligence unless such intention is expressed in unequivocal terms. (*Employers' Liability Assur. Corp.* v. *New York Linen Supply & Laundry Co.,* 239 N. Y. 560; *Manhattan Ry. Co.* v. *Cornell,* 54 Hun, 292; aff'd., 130 N. Y. 6347.)
>
> "That such is the rule in this State has been recognized alike by the Federal courts as well as courts of other states, the decision in *Manhattan Ry. Co.* v. *Cornell* (*supra*), being cited in support thereof. (Cf. *Wallace* v. *United States,* 16 Fed. Rep. (2d) 20; *Perry* v. *Payne,* 217 Penn. St. 252.)"

and further stated:

> "The mere fact that the accident occurred while the employees of appellant were engaged in work as defined in the contract is not sufficient to impose liability under the indemnity agreement. While it is true that the accident would not have occurred had they not been so engaged, the work was not the cause of the accident. It was respondent's own negligence which was the cause, and under such circumstances the language of the indemnity agreement was far too general in its nature to impose liability upon the appellant."

Subsequent to the above decision a similar question was again raised in said Court in the action of *Employers' Liability Assurance Corp. Ltd. of London, England, respondent,* v. *Post & McCord, Inc., appellant,* 286 N. Y. 254, and the Court affirmed the *Thompson-Starrett Co.* v. *Otis Elevator Co.* opinion discussed above.

Under the rule laid down by this Court in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, the Circuit Court of Appeals should have followed the law as declared by the decisions of the highest court of the State of New York.

POINT II.

The decision of the Circuit Court of Appeals is in conflict with the decisions in other circuits.

It appears to be a general rule that contracts of indemnity will be strictly construed and should be when it is claimed that they relieve the indemnitee of liability for his own negligence, and they will not be so construed unless such agreement is expressed in clear and unequivocal terms.

In *United States* v. *Wallace, et al.*, 18 Fed. (2d) 20 (C. C. A. 9) the Circuit Court of Appeals for the Ninth Circuit in deciding an action instituted by an injured employee of a contractor, for damages in compensation of injuries sustained through the negligence of the ship owner, held that a provision as follows, "the contractor is to fully protect the ship and owners against any and all claims for injury to workmen engaged by him or his sub-contractor, in carrying out work on the vessel," read literally, would undoubtedly be broad enough to cover a case where the indemnitee is alone chargeable, but stated that it would not so interpret the provision, quoting as authority for its interpretation of the provision, 5 Elliott on Contracts, Section 407, to the effect "a contract of indemnity against personal injuries should not be construed to indemnify against the negligence of the indemnitee himself, unless such an intention clearly appears," and laid down the following rule:

> "The established principle is thought to be that general words alone do not necessarily import an intent to hold an indemnitor liable to an indemnitee for damages resulting from the sole negligence of the latter; it is but reasonable to require that an obligation so extraordinary and harsh should be expressed in clear and unequivocal terms. *Perry* v. *Payne*, 217 Pa. 252, 66 A. 553, 11 L. R. A. 1173, 10

Ann. Cas. 589; *Mitchell* v. *Southern Ry. Co.*, 124 Ky. 146, 74 S. W. 216; *Manhattan Ry. Co.* v. *Cornell*, 54 Hun, 292, 7 N. Y. S. 557, Id., 130 N. Y. 637, 29 N. E. 151; *Houston & T. C. R.* v. *Diamond Press Brick Co.* (Tex. Civ. App.) 188 S. W. 32; *Marshall* v. *Maryland R. R. Co.*, 1 W. W. Har. (Del.) 170, 112 A. 526; *Mynard* v. *Syracuse*, 71 N. Y. 180, 27 Am. Rep. 28; *Dingledy Co.* v. *Erie R. Co.*, 102 Ohio St. 236, 131 N. E. 723."

Other circuits have discussed the same general principles and laid down the same general rules. See:

Doughnut Mach. Corporation v. *Bibbey*, 65 Fed. (2d) 634, 637 (C. C. A. 1);

Sinclair Prairie Oil Co. v. *Thornley, et al.*, 127 Fed. (2d) 128, 133 (C. C. A. 4);

Southern Bell Telephone & Telegraph Co. v. *Mayor and Board of Aldermen of City of Meridian, Miss.*, 74 Fed. (2d) 983, 985 (C. C. A. 5);

Buckeye Cotton Oil Co. v. *Louisville & N. R. Co.*, 24 Fed. (2d) 347, 348 (C. C. A. 6);

North American Ry. Const. Co. v. *Cincinnati Traction Co.*, 172 Fed. 214, 216 (C. C. A. 7).

LASTLY.

It is respectfully submitted that a writ of certiorari should be issued to review the decision of the Circuit Court of Appeals for the Second Circuit in this case.

Respectfully submitted,

MACKLIN, BROWN, LENAHAN & SPEER,
Proctors for Petitioner.

PAUL SPEER,
Counsel for Petitioner.